

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SEAN JEFFERY RICHSON-BEY,

Plaintiff,

v.

JUAREZ,

Defendant.

Case No. 1:22-cv-00567-NODJ-BAM (PC)

ORDER CONSTRUING NOTICE OF
VOLUNTARY DISMISSAL AS MOTION
FOR VOLUNTARY DISMISSAL
(ECF No. 45)

ORDER DIRECTING DEFENDANT TO
RESPOND TO PLAINTIFF'S MOTION FOR
VOLUNTARY DISMISSAL
(ECF No. 45)

SEVEN (7) DAY DEADLINE

Plaintiff Sean Jeffery Richson-Bey ("Plaintiff") is a former state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. This action proceeds against Defendant Juarez for excessive force in violation of the Eighth Amendment.

On December 7, 2023, Defendant filed a motion to revoke Plaintiff's *in forma pauperis* status on the ground that Plaintiff has been released from custody since initiating this action. (ECF No. 43.) The Court stayed briefing on the motion and directed Plaintiff to submit an application to proceed *in forma pauperis* for a non-prisoner within thirty days. (ECF No. 44.)

Currently before the Court is Plaintiff's notice of withdrawal/voluntary dismissal, filed January 12, 2024. (ECF No. 45.) The notice states that Plaintiff moves to voluntarily withdraw this action initiated pursuant to 42 U.S.C. § 1983. (*Id.*)

1 “[U]nder Rule 41(a)(1)(i), a plaintiff has an absolute right to voluntarily dismiss his action
2 prior to service by the defendant of an answer or a motion for summary judgment.” *Commercial*
3 *Space Mgmt. Co., Inc. v. Boeing Co., Inc.*, 193 F.3d 1074, 1077 (9th Cir. 1999) (quotation and
4 citation omitted). “[A] dismissal under Rule 41(a)(1) is effective on filing, no court order is
5 required, the parties are left as though no action had been brought, the defendant can’t complain,
6 and the district court lacks jurisdiction to do anything about it.” *Id.* at 1078.

7 Federal Rule of Civil Procedure 41(a)(1)(A)(ii) further provides that a “plaintiff may
8 dismiss an action without a court order by filing a stipulation of dismissal signed by all parties
9 who have appeared.” Fed. R. Civ. P. 41(a)(1)(A)(ii).

10 A party may also dismiss an action by filing a motion requesting the Court to dismiss the
11 action. Fed. R. Civ. P. 41(a)(2). A motion for voluntary dismissal under Rule 41(a)(2) is
12 addressed to the sound discretion of the district court. *Hamilton v. Firestone Tire & Rubber Co.*
13 *Inc.*, 679 F.2d 143, 145 (9th Cir. 1982).

14 As Defendant has already filed an answer and Plaintiff’s notice of voluntary dismissal
15 includes only his signature, Plaintiff may not dismiss this action pursuant to Rule 41(a)(1).
16 Instead, the Court finds it appropriate to construe the notice as a motion for voluntary dismissal
17 under Rule 41(a)(2). Therefore, Defendant is directed to file an opposition or statement of non-
18 opposition to the motion. Alternatively, Defendant may obtain a stipulation of dismissal that is
19 signed by all parties appearing in this action. **Any stipulation should specify whether this**
20 **action will be dismissed with or without prejudice.**

21 Accordingly, IT IS HEREBY ORDERED as follows:

- 22 1. Plaintiff’s notice of voluntary dismissal, (ECF No. 45), is CONSTRUED as a motion for
23 voluntary dismissal;
- 24 2. Within **seven (7) days** from the date of service of this order, Defendant is DIRECTED to
25 file either:
 - 26 a. An opposition or statement of non-opposition to Plaintiff’s motion for voluntary
27 dismissal; or

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1 b. A stipulation to dismiss this action pursuant to Federal Rule of Civil Procedure
2 41(a)(1)(A)(ii), signed by all parties appearing in this action and specifying
3 whether this action will be dismissed with or without prejudice.
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5 IT IS SO ORDERED.

6 Dated: January 12, 2024

7 /s/ Barbara A. McAuliffe
8 UNITED STATES MAGISTRATE JUDGE
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